UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAMIE KOMEN and
LAURA HORWITCH,

Plaintiffs,

v.

NORTH SHORE SCHOOL DIST. 112, and
DANIEL KORNBLUT,

Defendants.

No. 01 C 0314
Judge James B. Zagel

MEMORANDUM OPINION AND ORDER

This case comes before me on a motion to dismiss, so I assume the facts alleged in the complaint, and restated below, are true.

Jamie Komen was a teacher and Laura Horwitch was a social worker employed by North Shore School District #112. They worked at Elm Place Middle School, where Daniel Kornblut was the principal. Kornblut engaged in unwelcome conduct toward both Komen and Horwitch. To Komen, he made sexually suggestive comments in front of students, faculty and parents about her body shape; made demeaning comments about Komen and her gender; made obscene and unwanted looks of a sexual nature; interrogated her and made derogatory comments about her sexual relationships; told students that if they couldn't pay attention to her, at least they could look at her attractive body; said that Jewish women don't "put out" after they are married, and they don't "swallow;" commented on the body shape and physical appearance of other women; made a constant barrage of sexually suggestive remarks, jokes and language; touched and grabbed her in an unwelcome and harassing manner, and to demonstrate control.

Komen complained to Kornblut and he threatened to prevent her from achieving tenure, to replace her, and implied that any complaints would result in retaliation. He didn't change his behavior. Komen complained to the School District, but it failed and refused to prevent Kornblut's conduct. Komen resigned because she could not take Kornblut's behavior any more. After her resignation, School District officials falsely accused Komen of violating district policies and widely disseminated these false accusations; threatened her with criminal prosecution; threatened other employees to prevent them from using Komen's new business venture; induced potential clients of her new business not to use her services.

Horwitch had a similar experience at Elm Place Middle School. Kornblut made sexually suggestive comments; made offensive comments about Jewish women; told a student, in front of Horwitch, teachers and a parent, that the first three letters of "titanic" spelled his favorite word; said a teacher would be allowed to observe a class for the purpose of assessing a student's educational needs only if this teacher had intercourse with him first; and subjected Horwitch to unwanted touching. Horwitch complained to both Kornblut and the School District, but no action was taken. Like Komen, Horwitch resigned because of Kornblut's behavior, and as with Komen, the School District spread false accusations about Horwitch and interfered with her new business venture.

There are fifteen counts in plaintiffs' complaint and defendants want them all dismissed. Counts I-III and V-VII are sexual harassment, religious discrimination and national origin discrimination claims under 42 U.S.C. §§ 2000e, *et seq*. (Title VII). (One count each for Komen and Horwitch.) Counts IV and VIII are retaliation claims, and all of the first eight counts are against the School District only. Counts IX-X and XII-XIII are 42 U.S.C. § 1981 and § 1985 claims against both the School District and Kornblut. Counts XI and XIV are 42 U.S.C. § 1986 claims against the School District only. And finally,

Count XV (brought jointly by Komen and Horwitch) is a state law claim for tortious interference with prospective economic advantage against both Kornblut and the School District.

1. Harassment

The School District thinks plaintiffs have failed to allege severe or pervasive harassment. But based on the complaint, I cannot say there is no possibility for plaintiffs to prove severe or pervasive harassment. This is not a summary judgment motion, and it does not take much to survive a motion to dismiss. See *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998). Here, Komen and Horwitch plead conclusory allegations that Kornblut subjected them to a barrage of offensive conduct; that is all they need to say. I have no doubt that defendants are sufficiently on notice as to the gist of the claims against them, and these plaintiffs are entitled to discovery before being put to their proof. *Id.* at 519.

2. Adverse Action

Next, Defendants argue that there was no adverse employment action since plaintiffs resigned. This, I take it, is an attempt to knock out the potential strict liability for the School District. Since Kornblut was a supervisor, if his harassment culminated in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no *Faragher* defense. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S.Ct. 2275, 2292-2293 (1998). Although the Supreme Court did not explicitly include constructive discharge in its list of tangible employment actions, I think the list was not exhaustive. In this Circuit, adverse employment actions (often discussed in retaliation claims) come in many shapes and sizes; they are to be considered in context. See *Knox v. Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); see also *Heuer v. Weil-McLain*, 203 F.3d 1021, 1023 (7th Cir. 2000) (constructive discharge may be a classic example of adverse action). There can be no question the

complaint says Komen and Horwitch quit because they found their working conditions intolerable. Defendants are on notice that plaintiffs believe they were constructively discharged as a result of harassment, and this, I find, is a sufficient allegation of a tangible employment action. Of course, defendants are free to develop a record through discovery to attack the contentions of the complaint.[1]

3. Retaliation

Plaintiffs did not allege facts to support a retaliation claim in their administrative charges, filed in the Illinois Department of Human Rights. Both checked the box for retaliation, but the facts attached to the charges only accuse defendants of sexual harassment, constructive discharge, and religious and national origin discrimination. The general rule is that a plaintiff cannot bring claims in her lawsuit that are not included in her administrative charge. *Cheek v. Western and Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994). If there is a reasonable relationship between the claim in the complaint and the allegations in the charge, and if the claim can reasonably be expected to grow out of an EEOC investigation of the charge, then plaintiff may proceed notwithstanding her failure to put the issue squarely before the agency. *Id.* Failure to satisfy either of these conditions is grounds for dismissal. *Id.*

It is not enough that plaintiffs checked the box for retaliation. The facts attached to the charge give no indication that plaintiffs suffered adverse consequences as a result of some protected activity. One purpose of the charge is to put the employer on notice, see *Cable v. Ivy Tech State College*, 200 F.3d 467, 476-477 (7th Cir. 1999), and these charges do not alert the School District of any possible basis for a retaliation claim. Therefore, unless the retaliation claims are reasonably related to the charged allegations,

[1] I disregard the exhibits attached to defendants' reply brief. The resignation letters may be relevant at summary judgment, but are not properly before me on a motion to dismiss.

plaintiffs have failed to exhaust their administrative remedies. Retaliation and discrimination are separate wrongs; one's merits are generally independent of the other's. See *Place v. Abbott Laboratories*, 215 F.3d 803, 806 (7th Cir. 2000); *Heuer*, 203 F.3d at 1022. To be reasonably like or related, the administrative charge must describe the same conduct as the claim in the complaint. *Cable*, 200 F.3d at 477. The retaliation alleged in the complaint has to do with spreading false accusations and interfering with Komen and Horwitch's business – nothing related to these facts is alleged in the charges. The charges must be liberally construed, but it is too much of a stretch to infer the lawsuit's retaliation claims within the administrative charges. Therefore, I dismiss the retaliation claims from the complaint.

4. Komen's Religious/National Origin Claims

Komen did not allege religious or national origin discrimination in her administrative charge; Horwitch did, but Komen did not. The fact that Horwitch included these allegations does not save Komen; her case is her own and she must exhaust her own administrative remedies. However, unlike her retaliation claim, her religious and national origin claims are reasonably related to her sex discrimination claims. The conduct and the accused are the same. The charges do not detail Kornblut's comments, but the complaint makes it clear that the comments about Jewish women form, in part, the basis for all the discrimination claims. An EEOC investigation would undoubtedly reveal the religious or ethnic angle of Kornblut's comments. Therefore, Komen's religious and national origin claims fall within the scope of her administrative charges and survive dismissal.

5. 42 U.S.C. § 1981

Section 1981 prohibits intentional racial discrimination, and defendants correctly point out that plaintiffs do not allege racial discrimination. Plaintiffs respond by asking to amend these Counts to state § 1981a claims. Such a request may be made by separate motion, not in an opposition to a motion to dismiss. *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir. 1996). Counts IX and XII are dismissed.

6. 42 U.S.C. § 1985

The intracorporate conspiracy doctrine generally bars § 1985 claims alleging a conspiracy among members of a single governmental entity. *Wright v. Illinois Department of Children and Family Services*, 40 F.3d 1492, 1508 (7th Cir. 1994). School administrators fit within this rule. *Rojicek v. Community Consolidated School Dist. 15*, 934 F. Supp. 280, 281 (N.D. Ill. 1996); *Cromley v. Bd. of Education of Lockport School Dist. 205*, 699 F. Supp. 1283, 1291-1292 (N.D. Ill. 1988).

I note that plaintiffs do not identify any co-conspirators by name or title. The count simply says "defendant School Board and its agents" agreed with Kornblut to violate plaintiffs' rights. This highlights the whole point of the intracorporate conspiracy bar. Essentially, plaintiffs are alleging that the entire School District conspired with itself. The conspiracy claim does not allege anything other than a Title VII violation for which the employer would be liable anyway. Adding an allegation that the Board agreed with its employee adds nothing. The complaint does not allege numerous acts undertaken by several agents, as in *Volk v. Coler*, 845 F.2d 1422, 1435 (7th Cir. 1988), such that it alleges a conspiracy that is part of a broad pattern that permeates the ranks of the organization (an exception to the intracorporate conspiracy bar). The complaint does not allege that the conspirators were motivated *solely* by personal concerns (the

other exception). *Berry v. Illinois Dept. of Human Services*, 2001 WL 111035 * 9, No. 00 C 5538 (N.D. Ill. 2001). This must be something more than the class-based animus generally required of § 1985 claims. *Hartman v. Bd. of Trustees of Community College District No. 508, Cook County*, 4 F.3d 465, 470 (7th Cir. 1993). The complaint lacks any allegation that the School Board, or Kornblut for that matter, acted solely out of personal bias, other than the discriminatory intent one could infer from Kornblut's conduct. I find the conspiracy claim is barred by the intracorporate conspiracy doctrine, and is in essence redundant of the Title VII claim. Therefore, Counts X and XIII are dismissed.

7. 42 U.S.C. § 1986

Unlike the other civil rights statutes, § 1986 has a one-year statute of limitations. 42 U.S.C. § 1986. Plaintiffs filed their complaint on January 17, 2001, and the conduct occurred on and prior to August 19, 1999. Counts XI and XIV are time-barred.

However, plaintiffs note that they could not file their Title VII claims until they exhausted administrative remedies, which often takes over one year. If they are barred from pursuing their § 1986 claims, they will be penalized for following the requirements of Title VII. It is not uncommon for two different causes of action to have different limitations periods (or administrative requirements), and the fact that some tension might exist is not sufficient, in my view, to toll the congressionally mandated period.[2]

In any event, even if I were inclined to toll statute of limitations, plaintiffs' failure to state a § 1985 claim dooms their § 1986 claims. *Williams v. St. Joseph Hospital*, 629 F.2d 448, 452 (7th Cir. 1980); *Garrison v. Burke*, 1997 WL 37909 * 11 (N.D. Ill. 1997), *aff'd* 165 F.3d 565 (7th Cir. 1999).

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[2] One court has held that the one-year period cannot be tolled. *Bieros v. Nicola*, 839 F. Supp. 332, 337 (E.D. Pa. 1993); *but see Perez v. Doe*, 2001 WL 370224 * 2 (E.D.N.Y. 2001).

Counts XI and XIV are dismissed.

8. Continuing Violation

Generally, a Title VII plaintiff must base her claim on conduct occurring within 300 days of the filing of her administrative charge. *Hardin v. S.C. Johnson & Co., Inc.*, 167 F.3d 340, 344 (7th Cir. 1999). In this case, January 1, 1999 is the cut-off date. Plaintiffs' complaint includes conduct that occurred from October 29, 1998 to August 19, 1999. Defendants move to dismiss (or bar) any allegations concerning pre-January, 1999 conduct.

Plaintiffs say the continuing violation doctrine allows the inclusion of the mere two months of conduct prior to January 1, 1999. I agree. Based on the complaint, it seems reasonable to infer that plaintiffs would not have felt "sufficient distress to make a federal case" out of Kornblut's conduct until additional time had passed. *Hardin*, 167 F.3d at 344 (citation omitted). However, once discovery has occurred and a more precise timeline of events can be presented, it may be that plaintiffs should have perceived Kornblut's conduct as Title VII harassment earlier than they did. On a motion to dismiss however, the allegations stand.

9. Tortious Interference with Prospective Economic Advantage

Like their arguments on the merits of the Title VII accusations, defendants' arguments against Count XV, the Illinois tort claim, are better left for summary judgment. Defendants argue that plaintiffs have not alleged a reasonable expectation that they would enter into valid business relationships, but the complaint does allege this. See Complaint ¶ 119 (Plaintiffs "had reasonable expectation [sic] of entering into valid business relationships"). Complaints may contain conclusory allegations, and defendants are on notice of the gist of this claim. I also read the complaint as acknowledging plaintiffs' plan to prove this essential

element of their case. See *La Porte County Republican Cent. Comm. v. Bd. of Commiss.*, 43 F.3d 1126, 1129 (7th Cir. 1994). The reasonableness of plaintiffs' expectations cannot be resolved on a motion to dismiss.

Defendants also invoke the Illinois Local Governmental and Governmental Employees Tort Immunity Act. 745 ILCS 10/1-101, *et seq.* The immunity granted by this act applies only to injuries resulting from an act of a governmental employee that is both a determination of policy and an exercise of discretion. *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill.2d 335, 341, 692 N.E.2d 1177, 1181 (1998). This count (which is styled against both Kornblut and the School District) clearly does not concern a determination of policy. The complaint does not tell me what business venture Komen and Horwitch attempted, but I can reasonably infer that Kornblut's actions taken to interfere with that business did not involve a decision "to balance competing interests and to make a judgment call as to what solution would best serve each of those interests." *Harinek*, 181 Ill.2d at 342 (citation omitted). It was not a policy determination; the defendants are not immune.

There is a statute of limitations issue in addition to the substantive immunity question. "No civil action may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued." 745 ILCS 10/8-101. This statute applies to tortious interference with business expectancy. *River Park, Inc. v. City of Highland Park*, 295 Ill.App.3d 90, 96, 692 N.E.2d 369, 373 (2nd Dist.), *rev'd on other grounds* 184 Ill.2d 290, 703 N.E.2d 883 (1998). The one-year period, while a part of the Tort Immunity Act, "does not create a shield from liability, nor does it control whether one can hold a person or entity liable. It is simply a limitation upon the time allowed for commencing an injury action." *Herriott v.*

Powers, 236 Ill.App.3d 151, 155, 603 N.E.2d 654, 657 (1st Dist. 1992). The plain language of the statute imposes a one-year limitation period on any action against defendants. *Tosado v. Miller*, 188 Ill.2d 186, 191, 720 N.E.2d 1075, 1078 (1999). One purpose of the entire statutory scheme is to safeguard the coffers of governmental entities, thus the limitations period is another protection given to governmental entities, separate from the immunity question. By captioning this count against both Kornblut and the School District, plaintiffs are aiming at the District's funds, therefore the one-year period applies.

The complaint was filed on January 17, 2001; plaintiffs cannot rely on any tortious interference that occurred more than one year prior to filing. It may be possible, if pursued against Kornblut only and outside the scope of his employment (so that respondeat superior and government funds are not at stake) to avoid the one-year period. See *Herriott*, 236 Ill.App. at 158; see also *Racich v. Anderson*, 241 Ill.App.3d 336, 339-340, 608 N.E.2d 972, 974 (3rd Dist. 1993). However, Count XV is not pled that way; therefore to the extent it relies on conduct occurring prior to January 17, 2000 it is dismissed. The dismissal is without prejudice so that plaintiffs may rethink their approach to this cause of action.[3]

[3] Given the likelihood that plaintiffs will move for leave to amend to add Section 1981a claims, I think it appropriate to also allow them to seek leave to amend Count XV.

Conclusion

The motion to dismiss is granted in part/denied in part. Counts IV and VIII through XIV are dismissed with prejudice for failure to state a claim. Count XV is dismissed without prejudice to the extent it relies on conduct occurring before January 17, 2000.

ENTER:

James B. Zagel
United States District Judge

DATE: _____